SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

DUNCAN COFFEE COMPANY'S PETITION FOR REHEARING OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Duncan Coffee Company respectfully files this petition for rehearing of its petition for writ of certiorari to the United States Emergency Court of Appeals, which petition was denied on May 1, 1950, under Rule 33, paragraph 2, as amended October 13, 1947.

Substantial Grounds Available to Petitioner Although Not Previously Presented

The interpretation of the contract amendment in question, so as to take and deprive petitioner of the value of 3¢ for each pound of his roaster inventory as such, as was done by the respondent, is contrary to those sections of Amendment 5 to the Constitution of the United States which forbids depriving petitioner of his property without due process of law, and which forbids taking of petitioner's private property for public use without just compensation, for the following reasons:

(a) In the light of the uncontradicted and undisputed evidence (R. 134 to 137 inc., R. 4 to 17 inc., Br. 37 to 44 inc., and Br. 44 to 58 inc.), and of the dominant importing nature of the program and contract, and of the Emergency Price Control Act the language of the amendment in question was not sufficiently clear to overcome the constitutional requirement or to comply therewith, so as to work a forfeiture or to authorize the taking of some $79,000.00 from the value of petitioner's lawful roaster coffee as such.

(b) In the light of the traditional known industry distinction between the importer functions as such and the roaster functions as such and in the light of the requirement of law that this subsidy must be a production (importer) subsidy in order to be valid, the language of the contract amendment in question was not sufficiently clear to comply with the said constitutional requirement so as to authorize unreasonable discrimination against petitioner as a competitive coffee roaster as distinguished from its functions as an importer, or so as to authorize the establishment of unreasonable classification of petitioner within the coffee industry as a condition precedent to its continued lawful performance of both its importer functions as such and its roaster functions as such equally with all others or so as to subject petitioner's lawful roaster

functions and coffee to the peril of substantial competitive dissimilarity and discrimination, under the guise of alleged mutual agreement not characteristic of the industry and not expressly provided for by the language of the amendment in question with the same clarity as the language used in the original contract prior to its amendment in respect of petitioner's importer functions as such.

(c) The language of the contract amendment in question was not sufficiently clear, unequivocal and plain to comply with the said constitutional requirements so as to authorize respondent to disregard the established and competitive industry practices and equality of the roaster as such whether integrated or not, and so as to lawfully authorize the respondent to substantially and unreasonably discriminate against coffee roasters as such whose functions are admitted by respondent to be competitive and identical.

Statement and Summary

For the guidance of all coffee roasters as such, in their dealings with governmental agencies under similar circumstances or involving either regulations as such or agreements as such, it is important to clearly and definitely decide the question as to whether, under a single federal law arising from unusual conditions and authorizing a federal agency to issue regulations and also to make agreements for production subsidy purposes, the language of a regulation shall be interpreted so as to avoid unreasonable discrimination, depriving petitioner of the substantial equal and competitive value of its properties, while an agreement whose terms are of lesser clarity than comparable provisions contained in such regulations and which agreement arises in the identical atmosphere of abnormal disturbance, but deals primarily with traditional industry practices and conduct, shall be interpreted so as to deprive a coffee roaster

as such of the value of his lawful conduct and place upon him novel, substantial and unequal competitive peril.

The opinion and the cited decisions of the court below plainly indicate that had the language of the agreement here in question been used in a regulation instead of an agreement under the identical laws, circumstances and for identical purpose, such a regulation might thereby have become invalid (R. 173). The court attempts to rationalize its holding upon the theory that somehow an agreement as such under authority of identical law and for identical or similar purposes would make a difference in the significance of the language because of the legal aspect of a "mutual agreement", rather than the legal effect of identical acquiescence, acceptance, performance, conduct and reliance upon identical provisions, terms, language and conditions of a so-called "regulation" or "order". In truth the only actual difference is that, agreement is signed by the parties while a regulation was not customarily signed. But there was nothing to prevent even a regulation from being signed if desired, and if it were so signed the fact of signing would not necessarily change its effect in anywise.

Such statement in the opinion of the court, is the practical equivalent of pointing out that the effect of the particular language of itself, is in reality ambiguous and not clear or certain sufficiently to support the peril, forfeiture discrimination and privation complained of. The court does not attempt to find or point out any variation in context or purpose or origin between the identical language referred to when used in an agreement and when used in a regulation.

The lower court cannot and does not distinguish between the purpose or origin of a regulation and this agreement, each employing the identical language. If it were able to do so, it is most probable that by so doing it would thereby defeat its jurisdiction, since its jurisdiction, such regula-

tions and this agreement all arise from the identical source, premise, purpose and atmosphere of the unusual, rather than the usual. On the contrary, the court plainly and necessarily means that its interpretation of identical language when used in the identical context, purpose and intent of the identical legislative premise, depends wholly upon the mere choice of the nomenclature by which the particular vehicle containing such language may be called. This is confirmed by the sense of its own prior decisions cited in its opinion.

The plain sense of such reasoning is that, if identical language had been employed in a document called a regulation, of identical origin and purport instead of in a document called an agreement, such language would have rendered invalid the particular imposition as complained of in this transaction. This is necessarily true, because it is obvious that there is only one legislative premise and purpose out of which production subsidy can arise, and such premise makes no distinction between the effect, purpose or significance thereunder of either a regulation, agreement or an "order", regardless of the particular transaction undertaken by virtue of authority so arising. How therefore, can the lower court justify such a distinction when actually none is made by the sole authority of law upon which its own jurisdiction, and such regulations, agreements and orders alike must depend for validity?

If in such premises, there is in fact any distinction discernable between a regulation as such and this agreement or respondent's "order" amounting to its own unusual interpretation so as to include peril in the agreement which would not attach to such a regulation of identical purport and language, then it is logical to prescribe a lesser dignity and a more harmonious and consistent interpretation in keeping with the coffee roaster's traditional competitive

equality as such, to the agreement rather than the regulation arising from identical legislative premise which premise makes absolutely no distinction between such a regulation, agreement or "order".

By merely calling this transaction one of regulation, or contract, or agreement or order does not change the terms, intent, purposes or limitations of the authority from which the transaction arises. Nor would such mere nomenclature eliminate the extraordinary atmosphere of disturbance giving rise to the enactment of this authority—the restoration and stabilizing of traditional production and distribution being the essential element of such authority, as it was designed to support the traditional equality of a competitive economy.

The coffee roaster as such could naturally be expected to understand his competitive, economic equality and the constitutional protection of his identical values arising therefrom. It would be unnatural that his competitive, economic equality as proved by admissions and uncontradicted facts in evidence, and the constitutional protection against unreasonable discrimination, and of his property and values arising therefrom, are denied him in the case of an agreement but not denied him in the case of a regulation, when both arise and purport identically.

The ultimate and crucial fact is that, in the common and identical atmosphere attending regulations as such of this nature and this subsidy agreement, both alike arising from and subject to the identical sanction of specific legislation and intent, there is neither theoretical nor practical nor realistic difference in the force or the effect of one which does not likewise attend the other. While the agreement as such has been generally referred to as a contract, it is obvious that this is a mere choice of words, as between agreement, contract, regulation or the alleged "order",

which after all is not an "order" in ordinary sense but is a mere ministerial act of interpretation.

The lower court's amazing distincton between the interpretation and effect of this agreement as such and a regulation of like origin and attributes, to be expected by the coffee roaster's industry as such, is grossly discordant with the admitted industry tradition, with the constitutional prohibition of Amendment 5 and its own prior cited decisions upon the government's effort to fix similar peril under similar language in kindred regulations.

Its opinion effectively approves the fact of substantial unauthorized taking of petitioner's property, new irreparable and novel economic and competitive discrimination and inequality. Moreover, it subjects the coffee industry to peril of interpretation not visited upon others operating under and subject to identical legislation and economic premises.

Conclusion

Permission of this Honorable Court will be sought by the Honorable Wright Patman to file amicus curiae brief. Such brief when filed will be and is hereby adopted by this petitioner and accordingly consented to.

Wherefore, petitioner respectfully prays that this petition for rehearing of its petition for writ of certiorari to the United States Emergency Court of Appeals be accordingly granted.

SAMUEL H. PEAK,
Attorney of Record for Duncan Coffee Company, petitioner, Post Office Box 2079, Houston 1, Texas.

I, Samuel H. Peak, attorney of record for Duncan Coffee Company, petitioner, do hereby certify that the foregoing

petition is presented in good faith and not for delay, and that the petition is restricted to the grounds as appears in this petition for rehearing and as designated "Substantial Grounds Available to Petitioner Although Not Previously Presented" therein.

SAMUEL H. PEAK,
Attorney of Record for Duncan Coffee Company, petitioner, Post Office Box 2079, Houston 1, Texas.

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